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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 456

CHARLES E. LEYDECKER,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CLAIMS.

FRED W. SHIELDS,
Counsel for Petitioner.



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SUPREME COURT OF THE UNITED STATES

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No. 456

CHARLES E. LEYDECKER,

vs.

Petitioner,

THE UNITED STATES.

**PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CLAIMS.**

The petitioner, Charles E. Leydecker, prays that a writ of certiorari issue to review the judgment of the Court of Claims in the above case.

Opinion Below.

The opinion of the Court of Claims is officially reported in 97 C. Cls. 711.

Jurisdiction.

The judgment of the Court of Claims was entered April 5, 1943; petitioner's motion to vacate judgment was overruled on April 28, 1943; and petitioner's second motion to vacate, and to take additional evidence was overruled July 29, 1943. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

Question Presented.

Whether the Court below abused its discretion in overruling petitioner's motion to vacate the judgment entered in his favor when competent and uncontradicted evidence in the case showed conclusively that he was entitled to a judgment for a larger sum.

Statement.

The petitioner, an officer in the United States Army filed suit in the Court below, claiming additional rental and subsistence allowances on account of a dependent mother, as provided by the Act of June 10, 1922, c. 212, 42 Stat. 625, as amended by the Act of May 31, 1924, c. 224, 43 Stat. 250. The Court below, on December 7, 1942, announced its decision holding that the petitioner was entitled to recover the allowances claimed, but suspended the entry of judgment pending the filing by the General Accounting Office of a computation showing the amount due the petitioner under the Court's decision. On March 3, 1943, the General Accounting Office sent a computation to Chief Clerk of the Court below, showing that the petitioner was entitled to recover the sum of \$1,119.53. On April 5, 1943, the Court below entered judgment for the petitioner in the sum of \$1,119.53.

Petitioner next filed a motion to vacate the judgment, which motion was overruled by the Court on April 28, 1943. On June 28, 1943, the General Accounting Office filed a supplemental computation, correcting its original computation, and showing that the petitioner was entitled to recover \$1,252.53. It also *intimated* that the findings of fact of the Court below were erroneous, and that if corrected to accord with the actual facts the petitioner would be entitled to even more than the \$1,252.53. The corrected computation is printed in full as Appendix "A".

On July 21, 1943, petitioner filed a second motion to vacate the judgment and for leave to submit additional evidence, which motion was overruled on July 29, 1943.

Petitioner has not received payment of his judgment.

Specification of Error to Be Urged.

The Court of Claims erred:

1. In overruling petitioner's motion to vacate the judgment in his favor when the evidence in the case showed conclusively that the judgment had been erroneously computed, and that he was entitled to recover a larger sum.

Reasons for Granting Writ.

This case is important because it presents a situation where the judgment of a Court is plainly in error, but the Court refuses to correct it. It will be conceded that a Court has wide discretion in the granting or overruling of motions presented to it, and that ordinarily its action on such motions will not be reviewed on appeal, in the absence of a showing that it has abused the discretion vested in it. *cf. Rio Grande Irrigation Company v. Gildersleeve*, 174 U. S. 603, 609. Where, as here, the evidence in the case clearly shows that the judgment of the Court below has been erroneously computed, and the Court nevertheless refuses to vacate its erroneous judgment, it would seem that it has abused the discretion vested in it, and its action can properly be reviewed by this Court.

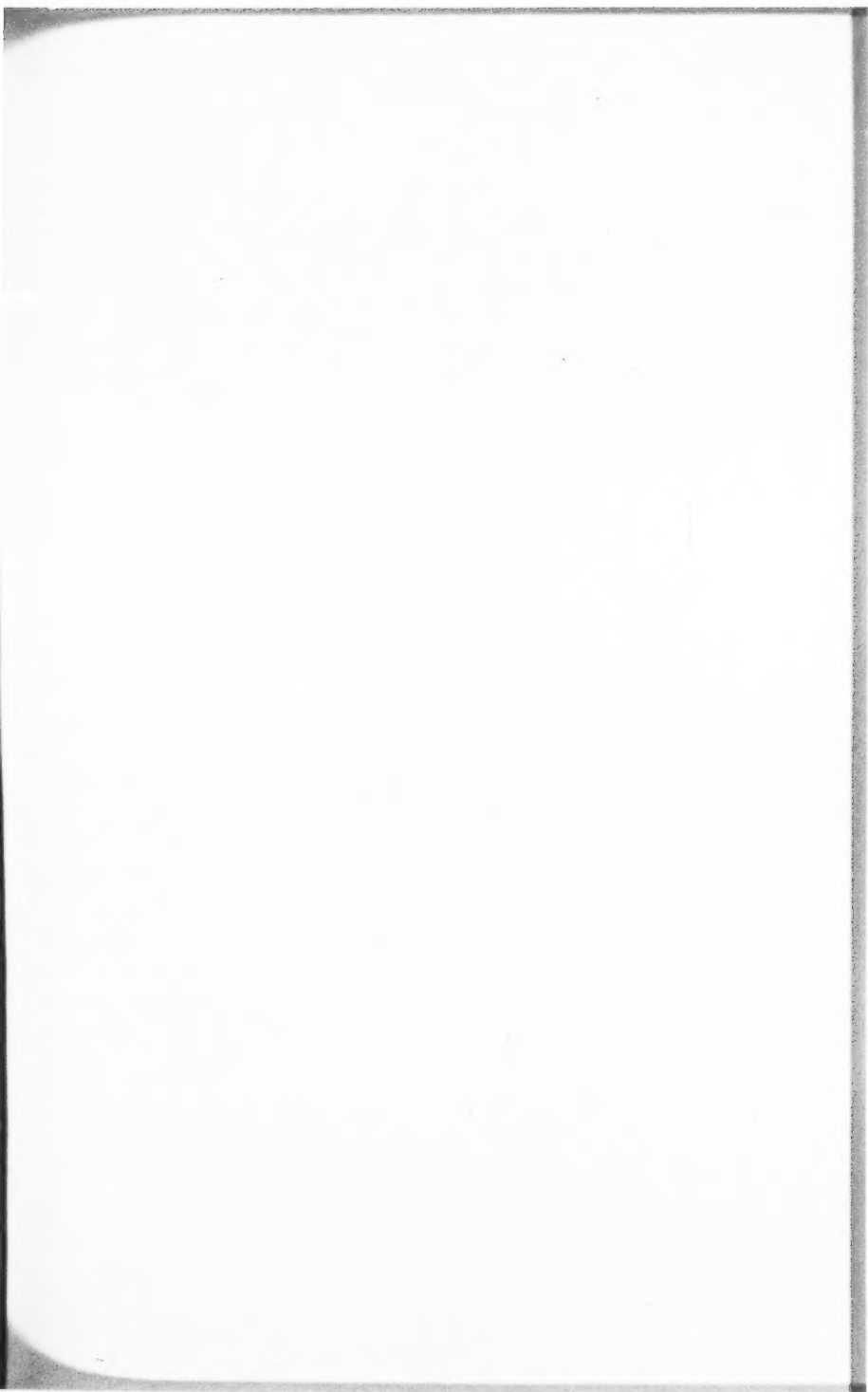
It will not be contended that this situation will arise frequently. However, it is significant that it has arisen before. *cf. Ruf v. United States*, 87 C. Cls. 248. In any event, it would seem that a matter of sufficient public importance to justify review by this Court is presented when a Court refuses to entertain a motion to vacate its judgment, although the evidence in the case shows conclusively that the judgment is erroneous.

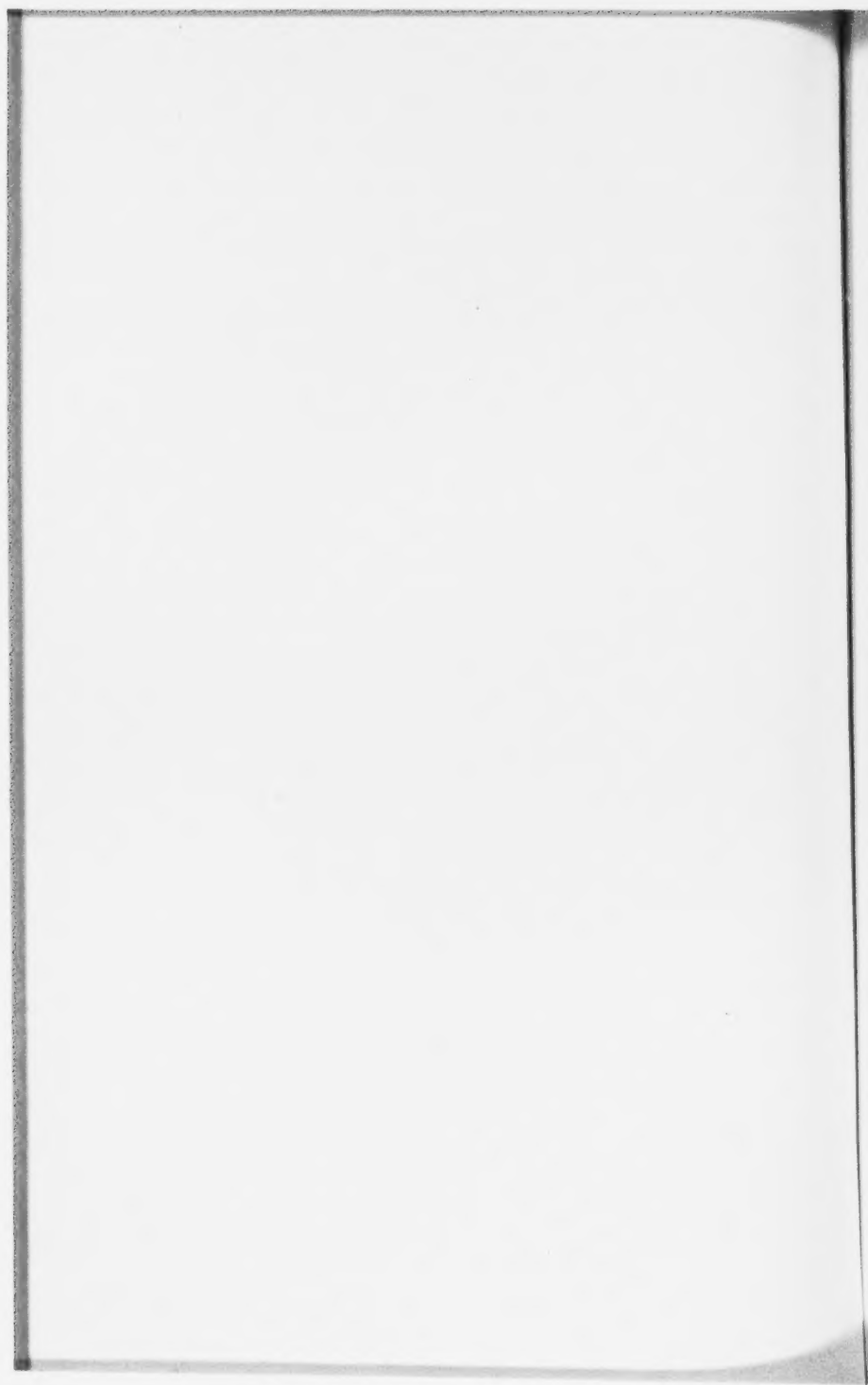
Conclusion.

It is respectfully submitted that, for the reasons stated, this petition for a writ of certiorari should be granted.

FRED W. SHIELDS,
Attorney for Petitioner.

October, 1943.





APPENDIX "A".

Assistant Comptroller General of the United States
Washington.

A-81375

hdk

Jun. 28, 1943.

The Chief Clerk, Court of Claims.

Re: Charles E. Leydecker v. United States, C. Cls. No.
45299.

SIR:

Reference is made to letter of this office dated March 3, 1943, wherein, in response to the court's request of December 16, 1942, in the above-entitled cause, you were informed that in accordance with the findings and the opinion rendered December 7, 1942, by the Court of Claims, there is payable to the plaintiff as increased rental and subsistence allowances on account of dependent mother for the period from January 1, 1938, to December 7, 1942, inclusive, the sum of \$1,119.53.

A letter of April 29, 1943, from King and King, attorneys for the plaintiff, concerning the said computation is, in part, as follows:

"It is believed that this computation is in error in that it does not include any rental allowance, and also apparently is only the computation of the additional subsistence allowance due a Captain of plaintiff's length of service. We have been advised by the plaintiff that his mother did not occupy quarters, and he was not assigned quarters adequate for an officer with dependents, for the period from March 10, 1942, to December 7, 1942. He also advises us that he was promoted from Captain to Major from June 15, 1942.

"In view of the information furnished us by the plaintiff, it is believed that his pay accounts should be re-examined in order to determine the correct amount due him under the Court's decision. In the event it is determined that the computation of March 3, 1943, is erroneous, we will appreciate your filing a corrected computation in the Court at your earliest convenience."

The computation furnished to the court by the said letter of March 3, 1943, was based on the latest service record of plaintiff then available in this office—the Official Army Register of January 1, 1942, at page 519, which shows the plaintiff as a captain and the special findings of fact made by the court on December 7, 1942.

Paragraph 1 of the said special findings of fact, which apparently purports to set forth all commissioned service of the plaintiff, shows that he was appointed a second lieutenant, U. S. Army, on June 13, 1933; was promoted to first lieutenant on June 13, 1936, and to *captain* (temporary) on September 9, 1940. It does not appear that any evidence was presented to the court to show that the plaintiff had been promoted from captain to major. With respect to the contention that the plaintiff was not assigned quarters adequate for an officer with dependents for the period from March 10 to December 7, 1942, paragraph 3 of the said special findings of fact is, in part, as follows:

“* * * Since 1934 plaintiff and his mother have occupied quarters assigned to him which quarters have been adequate for an officer of his rank and length of service with a dependent. They have occupied Government quarters continuously since January 1, 1938, with the exception of the period from July 15, 1938, to August 13, 1938, during which time plaintiff was in a ‘travel status’ and no quarters at his permanent station were assigned to him.”

Said findings preclude the crediting to plaintiff with any additional rental allowance over the period January 1, 1938, to December 7, 1942, except for the period from July 15 to August 13, 1938, as found by the court in paragraph 6 of said findings and as credited in the said computation of March 3, 1943.

Subsequent to the furnishing of the computation of March 3, 1943, there became available to this office in due course pay vouchers covering the plaintiff's pay for the months of May and June, 1942. Attached to the June voucher, No. 1136 in the June, 1942, account of Major J. P. Bellamy, F. D., is an extract of Special Orders No. 127, War Department, Washington, D. C., dated *May 15, 1942*, announcing that plaintiff was temporarily promoted from

captain to major and a certificate, Headquarters Seventh Armored Division, Camp Polk, Louisiana, dated May 21, 1942, certifying that plaintiff was sworn in as a major May 16, 1942. On the basis of his promotion to major the plaintiff became entitled effective June 1, 1942, under the act of June 16, 1942, 56 Stat. 361, and opinion of the court of December 7, 1942, to two additional subsistence allowances on account of his dependent mother, and since he was credited with only one such allowance from June 1, 1942, in the computation of March 3, 1943, a substituted computation is furnished herewith which includes two additional subsistence allowances from June 1 to December 7, 1942, in the sum of \$266 and wherein the total amount of \$1,252.53 is computed as due the plaintiff, under the opinion of the court of December 7, 1942, as follows:

One subsistence allowance for the period from January 1 to August 31, 1938, 243 days at \$0.60 per day, \$145.80, and rental allowance for one room from July 15 to August 13, 1938, 29 days at \$20 per month, \$19.33, a total of \$165.13 (paragraphs 6 and 7, page 3 of opinion), which allowances were credited currently in the plaintiff's pay account but credit therefor was suspended in the disbursing officer's account and subsequently the amount thereof was checked against the plaintiff's pay for the period from February 1, 1939, to September 30, 1940	\$165.13
One additional subsistence allowance per day from September 1, 1938, to May 31, 1940, 639 days at \$0.60 per day as computed in my report of February 25, 1941, A-81375, to you ..	383.40
One additional subsistence allowance per day from June 1, 1940, to May 31, 1942, 730 days at \$0.60 per day	438.00
Two additional subsistence allowances per day from June 1, 1942, to December 7, 1942, inclusive, 190 days at \$1.40 per day, act June 16, 1942, 56 Stat. 361	266.00
Total amount	\$1,252.53

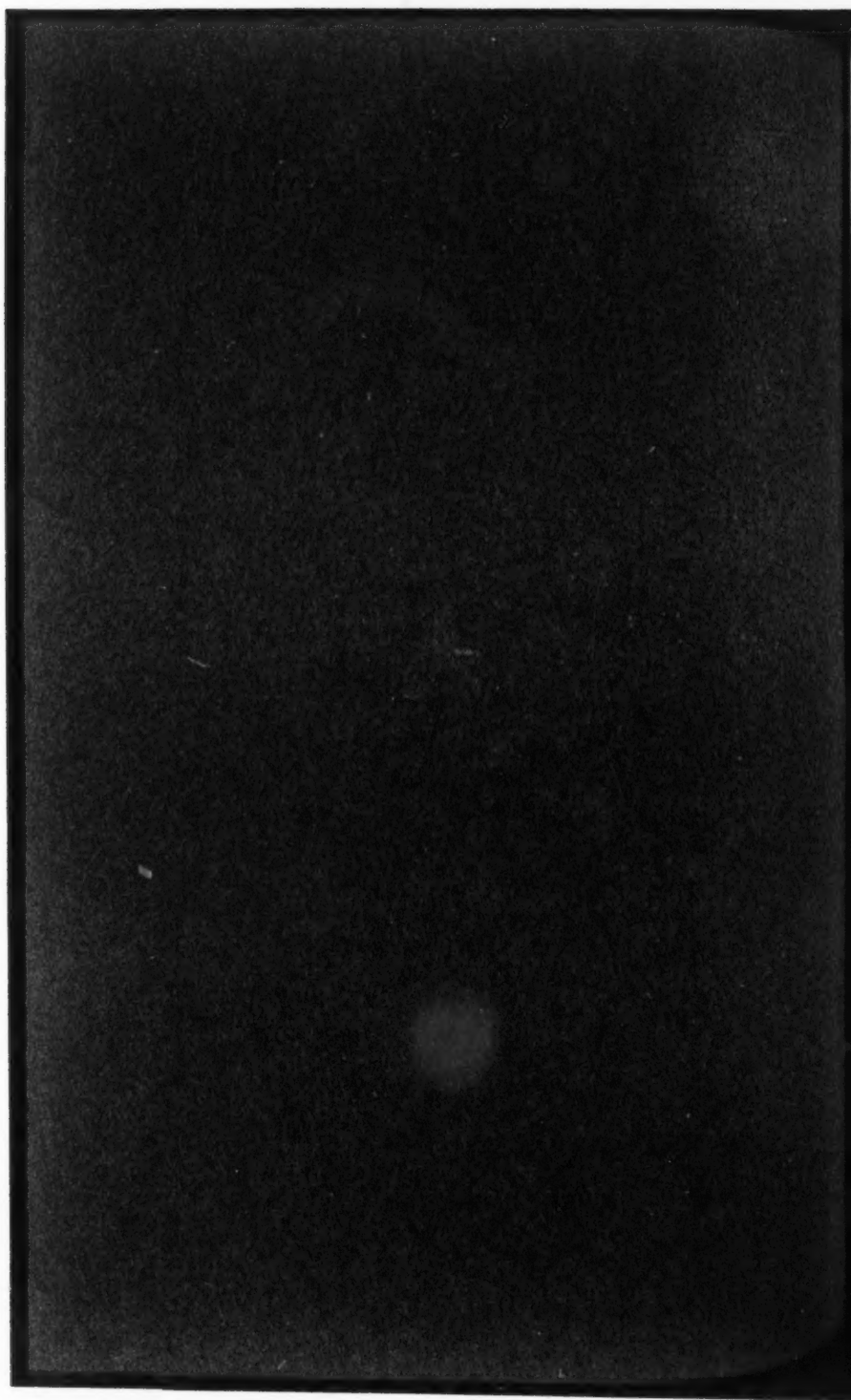
This revised computation is submitted for such consideration as the court may decide is proper in view of *Ruf v. United States*, 87 C. Cls. 248.

Respectfully,

(Signed) FRANK L. YATES,
*Assistant Comptroller General
of the United States.*

(8633)





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(1)



In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 456

CHARLES E. LEYDECKER, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT
OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 3-5)
is officially reported in 97 C. Cls. 711.

JURISDICTION

The judgment of the Court of Claims was entered April 5, 1943 (R. 5). Petitioner's first motion to vacate judgment was filed on April 27, 1943, and overruled on April 28, 1943 (R. 6). Petitioner's second motion to vacate judgment and for leave to offer additional evidence was filed on July 21, 1943, and overruled July 29, 1943 (R. 6). The petition for a writ of certio-

rari was filed October 26, 1943. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.¹

QUESTION PRESENTED

Whether the Court of Claims abused its discretion in denying petitioner's motions to vacate a judgment in his favor and for leave to offer additional facts alleged to show a right to greater recovery, where petitioner was aware of those facts almost a year prior to the entry of judgment but did not offer them to the court until after judgment.

STATEMENT

Petitioner, a commissioned officer in the United States Army, filed suit in the court below on November 8, 1940, for certain rental and subsistence allowances on account of a dependent mother (R. 1-2).² The matter was referred to a commissioner for a hearing and petitioner's proof was taken on March 3, 1941, no evidence being submitted by the

¹ The question of jurisdiction is discussed at pp. 6-7, *infra*.

² The Act of June 10, 1922, c. 212, 42 Stat. 625, 628, as amended by the Act of May 31, 1924, c. 224, 43 Stat. 250, and the Act of June 16, 1942, c. 413, 56 Stat. 359, 361, provides for the payment of rental and subsistence allowances to commissioned officers of the United States Army adjusted to their rank in the service. Higher allowances are provided for an officer with dependents, and a mother may in certain circumstances be a "dependent." Rental allowances do not accrue while the officer is assigned quarters at his permanent station unless such quarters are inadequate for occupancy by himself and his dependents.

Government. On March 6, 1942, the commissioner submitted his report to the court, finding that petitioner had been a commissioned officer since 1933 and a captain (temporary) since September 9, 1940; that petitioner's mother lived with him and was supported by him; and that adequate quarters had at all times been provided petitioner with the exception of one twenty-eight day period³ in 1938 (Record in Court of Claims No. 45299, Report of Commissioner pp. 5-6).

After such report was filed, petitioner was apparently assigned new quarters on March 10, 1942, which it is now alleged were not adequate for an officer with dependents (Pet. 5), and he was promoted to the rank of major on May 16, 1942 (Pet. 7). Although these facts, if true, would have entitled petitioner to additional rental allowances and higher subsistence allowances, he made no attempt at that time to apprise the court of his changed circumstances.

On October 5, 1942, the case was submitted to the court without argument on the basis of the commissioner's report and the briefs of the parties (R. 2), both sides requesting special findings of fact in accordance with the commissioner's report (Record in Court of Claims, Plaintiff's Request for Findings of Fact and Brief, p. 9; Defendant's Request for Findings of Fact and Brief, p. 11). On

³ The effect of this last finding, which was adopted by the court (R. 3-4), was to limit any recovery by petitioner for rental allowances to that period. See n. 2, *supra*.

December 7, 1942, the court filed its Findings, Conclusion of Law and Opinion which in effect incorporated the commissioner's report and found petitioner's mother to be dependent upon him for her support, entitling petitioner to the additional allowances provided by law for a dependent (R. 3-5). Judgment was suspended to await "a report from the General Accounting Office showing the amount due computed in accordance with" the court's Findings and Opinion (R. 5). Petitioner moved on December 10, 1942, for a call on the General Accounting Office to report the amount due petitioner in accordance with the court's decision (Record in Court of Claims). In response to such call the General Accounting Office submitted a report on March 4, 1943, which showed \$1,119.53 to be due, stating that this covered all claims of petitioner for rental and subsistence allowances on account of a dependent mother from January 1, 1938, to December 7, 1942, the date of the court's decision (Record in Court of Claims; see R. 5). The report showed on its face that the subsistence allowances were calculated on the basis of a captain's rank rather than that of a major and that no rental allowance had been figured except for the twenty-eight-day period in 1938. Petitioner on April 1, 1943, moved for judgment in accordance with the report, and judgment was entered on April 5, 1943 (R. 5).

Thereafter, on April 27, 1943, petitioner moved to vacate the judgment (R. 6) on the ground that he was entitled to additional rental allowances because of the Government's failure to provide quarters during a portion of the period covered by his claim, presumably the period between March 10, 1942, and December 7, 1942, and on the ground that there had been a failure to compute his subsistence allowance on the basis of his actual rank. (See Appendix 1, *infra*, pp. 11-12.) This motion was overruled without opinion on April 28, 1943 (R. 6). Petitioner then requested and obtained a supplemental report of the General Accounting Office setting forth the additional allowances due him as a major (See Pet. 5; Appendix A), and on July 21, 1943, without leave of court, again moved to vacate judgment and for leave to offer additional evidence (R. 6). The grounds for the second motion were identical with those set forth in the first motion (See Appendix 2, *infra*, pp. 13-14), but also made reference to the supplemental report of the General Accounting Office. This motion was overruled without opinion on July 29, 1943 (R. 6).

ARGUMENT

Petitioner prays for a writ of certiorari to review the judgment of the court below (Pet. 1) but does not assert that on the basis of the evidence presented any error of fact or law was committed in rendering the judgment. The

only error assigned and argued is the overruling of petitioner's motion to vacate such judgment and receive additional evidence alleged to show a right to recover \$133 more than was allowed (Pet. 2-3). The denial by the court below of petitioner's two motions to vacate the final judgment, based solely upon facts which were known to petitioner a year before the date of judgment and which could have been brought to the court's attention at several stages before the judgment, furnishes, we submit, no ground for review by this Court.

1. The judgment below was entered April 5, 1943, and the first motion to vacate was denied on April 28, 1943. The petition herein, filed October 26, 1943, is therefore out of time (28 U. S. C. § 350) unless the period for applying for a writ of certiorari was extended by the second motion, overruled July 29, 1943. Considered apart from the judgment itself, a motion to vacate, which is similar in effect to a motion for a new trial (*The Presbyterian Church of Glasgow, Mo. v. United States*, 44 C. Cls. 408; *Plumley v. United States*, 45 C. Cls. 185), is not appealable. *Pfister v. Finance Corp.*, 317 U. S. 144, 149; *Luckenbach S. S. Co. v. United States*, 272 U. S. 533, 535; *Montgomery Ward & Co. v. Duncan*, 311 U. S. 243, 254. While a motion for a new trial will, if seasonably filed, extend the time for taking an appeal from the final judgment, petitioner's second motion would not

fall within that category, for it was filed more than "60 days from the time the judgment of the court" was announced, and in any event was not filed "by leave of court" (Court of Claims, Rule 91).⁴ If the motion be considered in the nature of a request for leave to move for a new trial—the only motion petitioner could properly have filed at this point—it worked no extension of time for review of the judgment. *United States v. Seminole Nation*, 299 U. S. 417; *Morse v. United States*, 270 U. S. 151; *Gypsy Oil Company v. Escoe*, 275 U. S. 498. Moreover, the second motion was based on grounds identical with those advanced unsuccessfully for the first motion (see Appendices 1 and 2, pp. 11–14). The court's action on the first motion being *res judicata* as to the second (*Child v. United States*, 6 C. Cls. 44), the overruling of the second motion shortly after it was filed, without argument or opinion, indicates that the court below did not re-examine the "basis of the original" judgment, a requisite to extending the time for review. *Pfister v. Finance Corp.*, *supra*, at pp. 150–151. A petitioner is certainly not entitled to protract the statutory time for filing a writ of certiorari by making successive motions for a new trial on identical grounds. No reviewable order is therefore, we believe, before this Court.

⁴ The second motion also failed to meet formal and other requirements of a motion for a new trial based "upon the ground of newly discovered evidence" (Court of Claims Rule 95).

2. Even assuming that a reviewable order has been timely presented, there would be no basis for granting certiorari. Petitioner's sole complaint is of the refusal to receive additional evidence. But for newly discovered evidence to warrant a new trial, it must be shown by affidavit that such evidence could not by due diligence have been discovered earlier and produced at the trial (*Child v. United States*, 6 C. Cls. 44; *The Presbyterian Church of Glasgow, Mo. v. United States*, 44 C. Cls. 408; Court of Claims Rule 95).⁵ No such proof was submitted by the petitioner, nor could it have been. Petitioner's promotion to the rank of major and the change of living quarters occurred a year prior to judgment, and he could easily have brought these changes to the attention of the court below at anyone of several stages: (1) at the submission of the case to the court after the commissioner's report was filed;⁶ (2) after the interim

⁵ Rule 95 of the Court of Claims also requires that the affidavit show that the newly discovered facts were unknown to either the party or his attorney until after the close of the trial and the reasons why such evidence could not have been discovered before the trial with due diligence.

⁶ Upon submission of the case to the court below on briefs, the Government had suggested that since this was a continuing claim "entry of judgment be suspended until the coming in of proof showing whether or not plaintiff has continued to occupy with his dependent quarters furnished by the Government" (Court of Claims Record, Defendant's Request for Findings of Fact and Brief, p. 13). This was not acted on by either plaintiff or the court.

judgment of the court below, pending the report from the General Accounting Office; (3) after the report was filed, and prior to entry of judgment. Petitioner availed himself of none of these opportunities, but instead moved for judgment in accordance with the report of the General Accounting Office. Since such motion showed petitioner's complete satisfaction with the report and computation of the Comptroller General (*Ruf v. United States*, 87 C. Cls. 248), judgment was properly entered in accordance therewith. The facts upon which petitioner based his motions to vacate judgment having been known to him prior to judgment, there was no abuse of discretion in denying the motions to vacate that judgment. *Payne v. Colvin*, 276 Fed. 15 (C. C. A. 7), certiorari denied, 257 U. S. 652; *Donaldson v. Baltimore Acc. Corp.*, 47 F. (2d) 848 (C. C. A. 3); *Blue Diamond Co. v. Charles M. Allen & Son*, 56 F. (2d) 1 (C. C. A. 5), certiorari denied, 287 U. S. 615.

CONCLUSION

No question of general importance is raised by the petition for a writ of certiorari. The facts are unique, and in view of the lack of diligence shown by petitioner, the action taken below in-

volved no abuse of discretion. It is respectfully submitted that the petition should be denied.

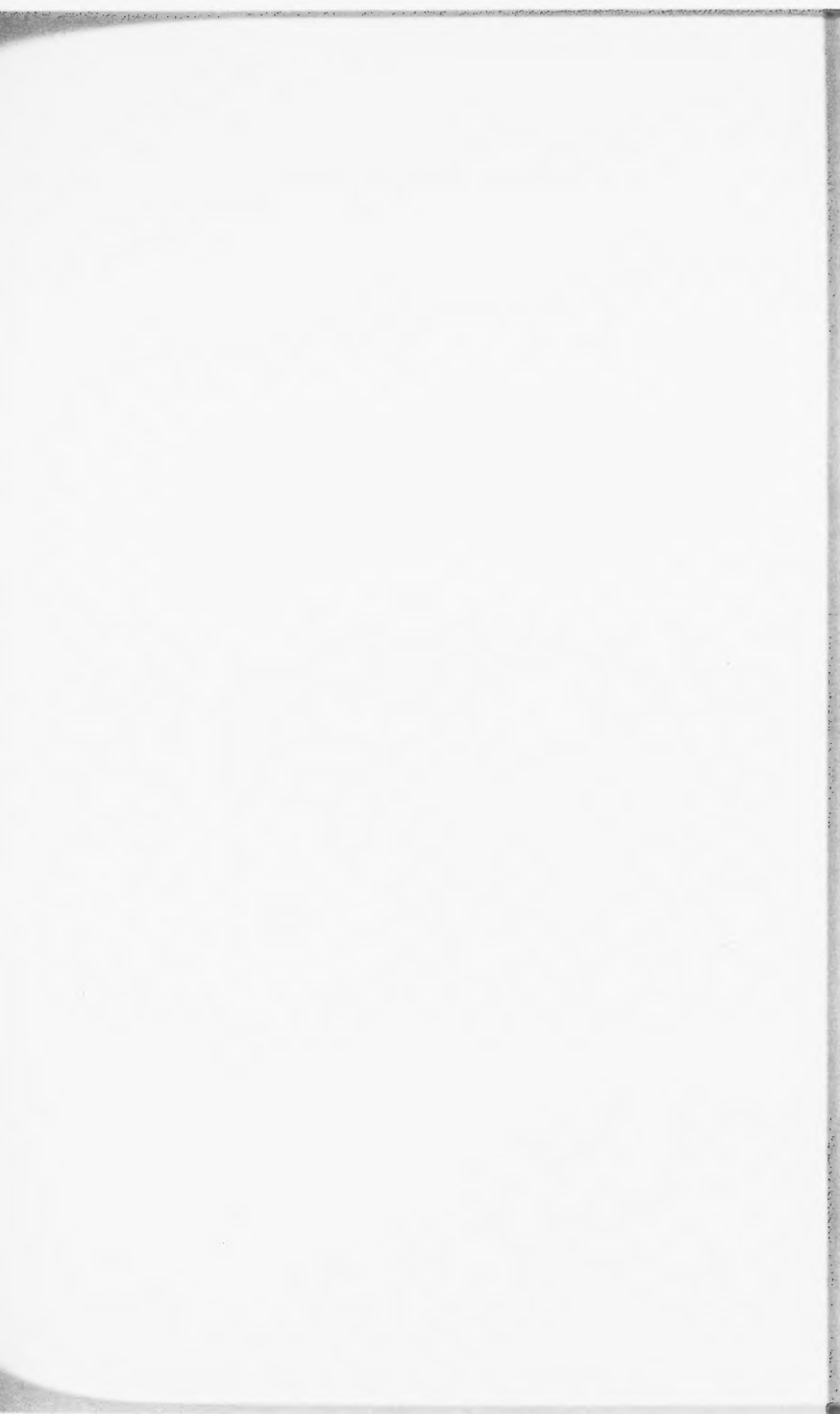
CHARLES FAHY,
Solicitor General.

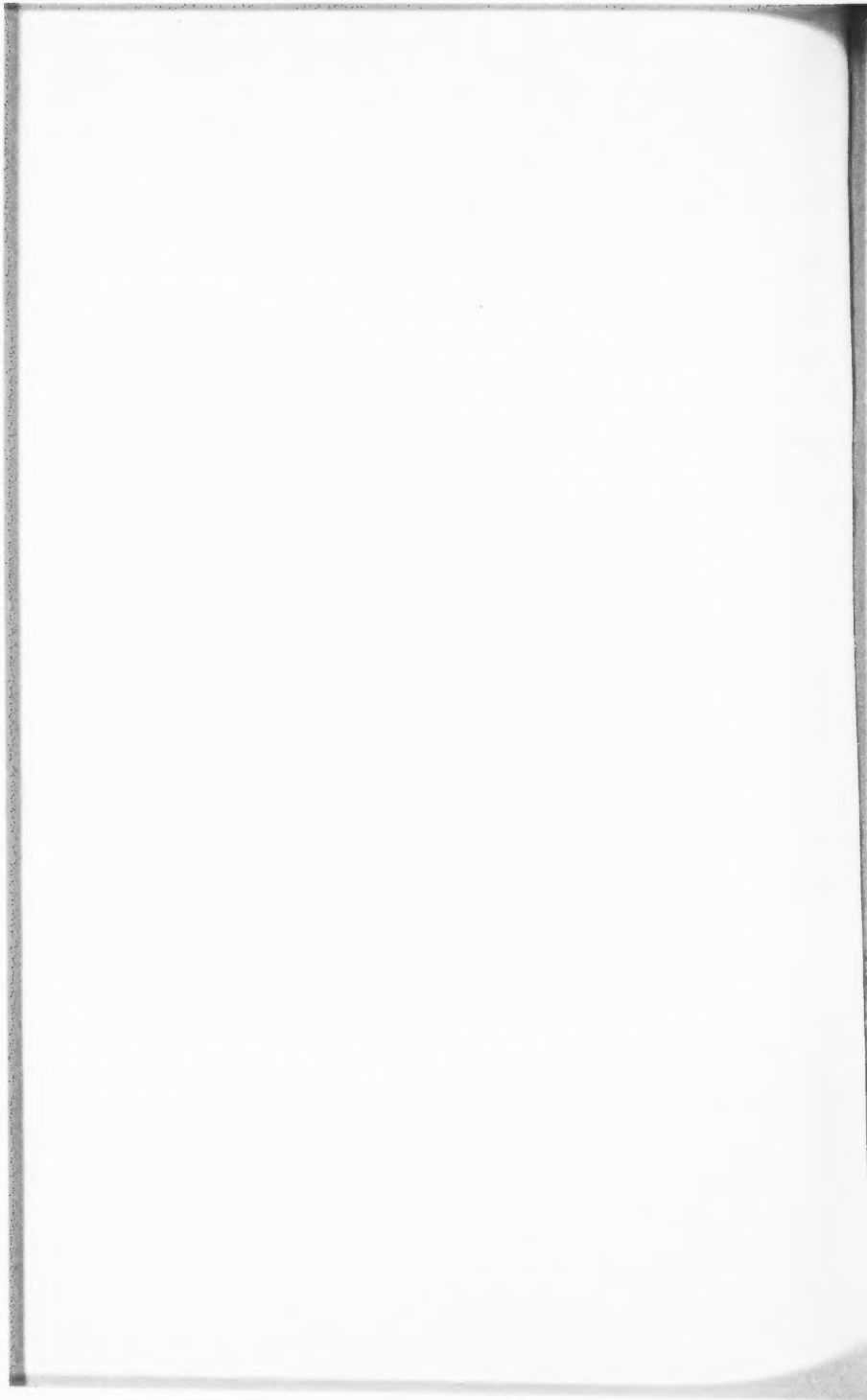
FRANCIS M. SHEA,
Assistant Attorney General.

DAVID L. KREEGER,
Special Assistant to the Attorney General.

CECELIA H. GOETZ,
Attorney.

DECEMBER 1943.





APPENDIX 1

MOTION TO VACATE JUDGMENT

Comes now the plaintiff, by his attorneys, and moves the Court to vacate the judgment entered in the above-entitled case on April 5, 1943.

(s) KING & KING,
King & King,
Attorneys for Plaintiff.

MEMORANDUM:

The Court announced its decision in the above case on December 7, 1942, but suspended the entry of judgment pending the filing by the General Accounting Office of a computation showing the amount due plaintiff under the Court's decision. A computation purporting to show the amount due plaintiff under the Court's decision was filed by the General Accounting Office on March 4, 1943, and on April 5, 1943, the Court entered judgment in favor of the plaintiff in the amount shown to be due him by the General Accounting Office's computation.

Plaintiff's attorneys are now advised that the General Accounting Office incorrectly computed the amount due plaintiff in that it failed to make any computation of rental allowances, although neither the plaintiff nor his dependent occupied any Government quarters during a portion of the period covered by his claim, and it failed to compute the subsistence allowance due him on the

basis of the rank actually held by him during a portion of the period covered by his claim.

In view of the fact that it appears that the General Accounting Office has not correctly computed the amount due plaintiff, it is requested that the judgment be vacated, and plaintiff be permitted to obtain a new and correct computation from the General Accounting Office.

(s) KING & KING.
King & King.

APPENDIX 2

PLAINTIFF'S MOTION TO VACATE JUDGMENT AND FOR LEAVE TO OFFER ADDITIONAL EVIDENCE

Comes now the plaintiff, by his attorneys, and moves the Court to vacate the judgment entered in the above-entitled case, and for leave to offer additional evidence in the case.

KING & KING,
Attorneys for Plaintiff.

MEMORANDUM:

On December 7, 1942, the Court announced its decision in the above-entitled case, holding that plaintiff was entitled to recover, but suspended entry of judgment pending the filing by the General Accounting Office of a computation showing the amount due plaintiff under the Court's decision. On March 4, 1943, the computation purporting to show the amount due plaintiff was filed by the General Accounting Office, and on April 5, 1943, the Court entered judgment in favor of the plaintiff in the amount shown to be due him by the General Accounting Office's computation.

On June 29, 1943, there was filed in the Court a supplemental report from the General Accounting Office showing that an additional amount was due plaintiff as subsistence allowance and intimating that there was additional rental allowance due him, which it was precluded from crediting to him by reason of Paragraph 3 of the Court's Special Findings of Fact.

Under the circumstances the judgment heretofore rendered in favor of the plaintiff should be vacated and leave be given him to obtain additional evidence bearing upon the quarters occupied by him or his mother during the entire period covered by the claim so that the Court's findings may be corrected and judgment entered for the amount properly due him.

KING & KING,
Attorneys for Plaintiff.

